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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR:

(c) QUESTION OF ENFORCED OR INVOLUNTARY DISAPPEARANCES

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[28 December 1990]

1. In resolution 1990/33, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a draft declaration on the protection of all persons from enforced or involuntary disappearances. This was an essential first step towards including in international and national positive law, a crime which, because of its particularly heinous characteristics, the huge scale on which it occurs and the direct or indirect involvement of State or its agents, is of a particularly serious nature.

2. In the final stages of the preparation of the draft, the American Association of Jurists put forward observations on the text (E/CN.4/Sub.2/1990/NGO/1) and some them were accepted by the Sub-Commission's Working Group on Detention.

3. The American Association of Jurists was deeply concerned about the failure to accept its proposal that the declaration showed specifically to rule out trial by military courts of persons accused of enforced disappearances.

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4. AAJ considers that the absence of such a clause is inconsistent with the overall structure of the draft, its objectives and purpose, and with other international instruments, and fails to take into account major drafts and proposals that have included such a provision, on the basis of international experience in trials of persons accused of disappearances.

5. One of the distinctive features of the crime of enforced disappearance is the involvement, by act or omission, of the State and/or its agents. It is impossible to see how the military courts, which are not independent, since the armed forces came under the Administrative Branch, could try cases in which the Administrative Branch itself might be involved.

6. In addition, the aim of the draft declaration is to classify enforced disappearance as an extremely serious offence, and to prevent and punish it, and the declaration contains many provisions designed to ensure that those who commit the offence do not benefit from impunity. However, by failing specifically to rule out military jurisdiction, it leaves a great loophole for impunity: the military courts, which in many countries demand and obtain jurisdiction to try military personnel accused of human rights violations, have never sentenced a member of the military for disappearances or for other human rights violations.

7. Enforced disappearance is an offence under the ordinary law. It is not a military offence, and proper administration of justice assigns jurisdiction to the military courts only for specifically military offences. Their jurisdiction should not extend to ordinary offences, even when they have been committed by military personnel: if such were the case, special military privilege would be transformed into a personal privilege, something which democracy finds repugnant.

8. This is the main thrust of various international instruments:

(a) The draft declaration on the independence and impartiality of the judiciary, which the General Assembly describes in resolution 44/162 as an "important contribution" and which the Commission on Human Rights (resolution 1989/32, para. 2) invites Governments to take into account in implementing the Basic Principles on the Independence of the Judiciary, stipulates in article 5 (f), that "the jurisdiction of military tribunals shall be confined to military offences";

(b) Article 10 of the draft declaration on enforced disappearances of the Organization of American States rules out trial by military courts in cases of enforced disappearances;

(c) Article 8 of the draft declaration on enforced disappearances adopted at the international symposium held in Buenos Aires in October 1988, stipulates that an independent jurisdiction shall impose criminal punishment on those responsible for disappearances;

(d) In July 1990 the NGO Coalition against Impunity issued a document signed by representatives of the World University Service, the National Council of Churches of the United States, Service for Peace and Justice, the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), the Justice and Peace Inter-Community Centre, the

International League for the Rights and the Liberation of Peoples and the International Association against Torture, in which it was proposed that the declaration should include the following article: "Such offences shall come under the jurisdiction of civil courts, even when the accused have been or are members of the armed forces";

(e) Paragraph 344 of the report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1990/13) states that "The single most important factor contributing to the phenomenon of disappearances may be that of impunity" and paragraph 345 that "Military courts contribute significantly to impunity, in the Working Group's experience.";

(f) The same conclusion was reached by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) in its May 1987 report on Honduras.

9. At the end of its work, the Working Group on Detention added a third paragraph to article 17 of the draft, reading: "Penal liability shall be effective independently of any immunities enjoyed by the individuals responsible". It should be noted that the French and English texts of the draft only mention "immunities" rather than "inmunidades de jurisdicción" (jurisidictional immunities) in the case of the Spanish text.

10. It is possible to interpret this paragraph as referring to the functional immunities enjoyed by certain authorities and also members of parliament, who may only be brought to justice under special procedures (for example, the lifting of parliamentary immunity). The fact that derogations from functional immunity can be made under this paragraph is a common feature of all democratic systems, but has nothing to do with whether special privileges are assigned to specific categories of persons. Broadly interpreted, the expression "inmunidad de jurisdicción" which appears in the Spanish text could be taken as referring to certain categories of persons that would be exempt from certain jurisdictions but not from others (for example, military personnnel would be exempt from civil, but not from military, jurisdiction). However, in no case does the paragraph in question exclude military courts from trying persons accused of enforced disappearances.

11. For this reason, AAJ suggests adding the following paragraph to article 17:

> "No special privileges, courts or exclusive jurisdictions shall be permitted for trials concerning the offence of enforced or involuntary disappearance. The offence shall not be considered as an offence committed in the course of duty, for the purpose of determining jurisdiction or the applicability of military criminal law."

12. AAJ also objects to the second sentence of article 21, paragraph 2,of the draft declaration. "This judicial review may determine" gives judges discretionary powers. In other words, the judge may decide to uphold an adoption that is the result of a kidnapping. It is inadmissible for the United Nations to accept, albeit implicitly, the possiblity that a crime should give rise to rights and that a manifestly unlawful adoption (attributable to a crime and which lacks the consent of the child's parents or closest relatives) should be valid.

13. Accordingly, AAJ suggests the following wording for paragraph 2 of article 21.

> "States shall establish in their legislation the relative nullity of adoptions of children who have been kidnapped or appropriated by third parties as a result of the enforced or involuntary disappearance of the family members in charge of them. Such nullity may only be made good with the consent of the child's closest relatives."

14. Having made these two corrections, the American Association of Jurists urges the Commission on Human Rights to adopt at its forty-seventh session the draft declaration on the protection of all persons from enforced and involuntary disappearances.